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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS VALDIVIESO,

Defendant and Appellant.

B210860

(Los Angeles County
Super. Ct. No. BA334749)

APPEAL from a judgment of the Superior Court of Los Angeles County.
George C. Lomeli, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner, Executive Director, Ann Krausz,
under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson
and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

After a jury convicted appellant Luis Valdivieso of sale of cocaine and possession for sale of cocaine, the trial court imposed a sentence of six years (with three prior convictions). On appeal, he contends that the evidence was insufficient to show he possessed the cocaine and that he was improperly impeached with his prior convictions. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Undercover Los Angeles Police Officer Jacqueline Orellana (Orellana) approached appellant on foot on San Pedro Street in Downtown Los Angeles and asked if he had a “20,” street vernacular for \$20 worth of narcotics. Appellant put his right arm over Orellana’s shoulder and walked her five to 10 feet to codefendant Majulin.¹ Appellant told Majulin that Orellana needed a “20.” Majulin produced a plastic bindle from his left jacket pocket containing rock cocaine and gave it to Orellana for four \$5 bills, which had been marked by the police. Following that transaction, Orellana signaled nearby police officers, who arrested appellant and Majulin. Police found the \$20 in premarked currency and additional bindles of rock cocaine in Majulin’s pocket. Police found \$206 in cash in appellant’s pockets: \$31 in his inner left jacket pocket and \$175 in his right front pants pocket. Neither appellant nor Majulin had any drug paraphernalia at the time of their arrest.

The People brought two criminal charges against appellant, sale or transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) and possession for sale of cocaine base (Health & Saf. Code, § 11351.5). Appellant pled not guilty. A jury convicted appellant on both charges. Appellant waived his right to a jury trial as to the truth of his prior convictions. Two of appellant’s prior convictions involved sale, transportation, or possession of a controlled substance, violations of the same statutes of which he was convicted at the trial. The final prior conviction concerned infliction of

¹ Majulin played no part in appellant’s criminal trial.

corporal injury on a cohabitant or spouse. The trial court found the prior allegations true and sentenced appellant to six years in prison.

DISCUSSION

I. Substantial evidence supported the jury's finding that appellant constructively possessed the cocaine in Majulin's pocket.

A defendant may be deemed to have the same possession as another actually possessing the narcotic where the defendant retains the right to exercise dominion and control over the narcotic. (*People v. Showers* (1968) 68 Cal.2d 639, 643-644.) Contrary to appellant's contention, he was not denied due process and substantial evidence established that he exercised dominion and control over the cocaine in Majulin's pocket.

The proper test for appeals challenging the sufficiency of the evidence is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the judgment and presuming every fact the trier could reasonably deduce from the evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Moreover, reversal is unwarranted unless it appears that there is no basis for finding substantial evidence to support the verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Constructive possession exists when a defendant either maintains control or the right to control contraband. (*People v. Showers, supra*, 68 Cal.2d at pp. 643-644.) A factor analysis is applied to determine the sufficiency of the defendant's control over contraband in the possession of another. The factors include the defendant's "capacity to direct the illicit goods, the manifestation of circumstances wherein it is reasonable to infer such capacity exists and the degree of direction being exercised by the accused over the contraband." (*Armstrong v. Superior Court* (1990) 217 Cal.App.3d 535, 539.) Here, all three factors militate in favor of the jury's finding that appellant maintained the necessary control over the cocaine in Majulin's pocket.

The jury could reasonably have believed that Majulin's immediate compliance with appellant's statement that Orellana needed a specific amount of narcotics strongly suggested that appellant had the capacity to direct the production of the narcotics

possessed by Majulin. That capacity is shown by the facts that Majulin did not need to ask any questions or seek clarification of the statement and did not leave appellant's or Orellana's sight. To this effect are the facts that the sale and arrest took place in an area of high narcotics traffic, that appellant carried a large amount of cash, that neither appellant nor Majulin carried any sort of drug paraphernalia, and that Orellana saw appellant and Majulin facing one another prior to approaching appellant. These facts demonstrate that the jury could have drawn inferences from these circumstances leading to the reasonable inference that appellant had the necessary dominion and control over the narcotics in Majulin's pocket. Finally, the degree of direction exercised by appellant over the narcotics is high: appellant put his arm around Orellana's shoulder and walked her to Majulin, instructed Majulin that Orellana needed a "20," and Majulin immediately complied, indicating that appellant could direct the narcotics to anyone in Orellana's purchasing position. The totality of these factors demonstrates that the jury had a substantial evidentiary basis for finding beyond a reasonable doubt that appellant constructively possessed the cocaine in Majulin's pocket.

Appellant relies on *People v. Mitchell* (1975) Cal.App.3d 21 to support his contention that the evidence of his constructive possession was insufficient to support the judgment. In *Mitchell*, the defendant was convicted of the sale of narcotics after she suggested that a police officer buy amphetamines from her father-in-law. (*Id.* at p. 23.) The sole issue on appeal was whether the trial court erred in failing to raise, sua sponte, the lesser offenses of possession or possession for sale. (*Ibid.*) The defendant and the officer traveled to the home of defendant's father-in-law, wherein the officer and the defendant's father-in-law executed the transaction, during which the defendant's father-in-law left the room for several minutes to retrieve the narcotics. (*Id.* at pp. 23-24.) The *Mitchell* defendant did not live in the home with her father-in-law, and her father-in-law testified repeatedly that the amphetamines were his alone and that he had acted alone in conducting the sale. (*Ibid.*) The court held that there was insufficient evidence of the defendant's dominion and control of the amphetamines to have required instruction on the possession crimes. (*Id.* at p. 25.) *Mitchell* is inapposite. In this case, Majulin's

immediate compliance with appellant's statement that Orellana needed a "20" demonstrates a much greater degree of control over the narcotics than in *Mitchell*, where the defendant's father-in-law had to leave the room for several minutes before returning, and in which the defendant's father-in-law testified repeatedly that he himself owned the amphetamines.

Moreover, the People adduced substantial evidence demonstrating that appellant aided and abetted Majulin in possessing the cocaine for sale. To be an abettor, appellant must have instigated, advised, or have been present for the purpose of assisting in the commission of the crime. (*People v. Valerio* (1970) 13 Cal.App.3d 912, 925; *People v. Villa* (1957) 156 Cal.App.2d 128, 133-134.) On the evidence presented, specifically that Majulin immediately complied with appellant's directive to sell Orellana a specific amount of narcotics, the jury could reasonably have found substantial evidence of appellant's presence for the purpose of commission of the crime or an advisory role in the crime's commission.

II. The trial court did not abuse its discretion by allowing the prosecutor to impeach appellant with his prior convictions.

Appellant contends that the trial court abused its discretion by permitting the prosecutor to impeach him with his prior convictions. We disagree.

Any crime of moral turpitude is admissible to impeach a defendant, subject to Evidence Code section 352, whether or not that crime was a felony. (*People v. Castro* (1985) 38 Cal.3d 301, 317.) Two of appellant's prior convictions, from 1985 and 1993, involved narcotics sale and possession for sale, violations of the same statutes at issue in the instant case. Such violations are classified as crimes of moral turpitude. (See *People v. Navarez* (1985) 169 Cal.App.3d 936, 949.) The third prior conviction, from 2004, was for domestic violence, which is also classified as a crime of moral turpitude. (See *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402.)

In reviewing for abuse of discretion, the fundamental inquiry is whether the decision of the trial court was sufficiently grave as to manifest a miscarriage of justice, or that the decision exceeded the bounds of reason. (*People v. Green* (1995) 34 Cal.App.4th

165, 182-183.) Whenever a trial court allows impeachment based on prior convictions, it must take into account whether the probative value is substantially outweighed by its potential for prejudice, confusion, or undue consumption of time. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296.)

The California Supreme Court has articulated a factor analysis to determine if a prior conviction should be admitted. The factors include the nearness or remoteness of the prior crime, its bearing on credibility, and whether the prior is for the same or substantially similar conduct for which the accused is on trial. (*People v. Beagle* (1972) 6 Cal.3d 441, 453-454.) Moreover, “[e]ven a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior.” (*People v. Mendoza* (2000) 78 Cal.App.4th, 918, 925-926.)

Applying the standard to the present case, appellant’s multiple convictions, spanning several years, are not indicative of a “legally blameless” life. Further, the trial court considered and rejected the use of an additional prior narcotics conviction from 1983 on remoteness grounds. As to the bearing of the prior convictions on appellant’s credibility, it does not exceed the bounds of reason to conclude that several convictions for crimes of moral turpitude would be probative. Finally, appellant contends that his prior convictions for narcotics sale and possession for sale should be excluded because they implicate the same conduct at issue in the trial. Prior convictions for the identical offense are not barred as a matter of law, but rather represent a single factor in the *Beagle* analysis. (*People v. Green, supra*, 34 Cal.App.4th at p. 183.) In *Green*, the defendant’s original conviction occurred approximately 20 years before the trial at issue and was followed by several subsequent convictions. (*Ibid.*) Like the *Green* defendant, appellant’s earliest conviction occurred approximately 20 years before the instant trial, and was followed by subsequent convictions, establishing the requisite pattern of criminal behavior relevant to credibility. (*Ibid.*)

The prosecutor mentioned the prior convictions during summation. Appellant contends that they be considered propensity evidence. This contention is not supported by the record. The prosecutor’s only mention of the prior convictions during summation

highlighted to the jury inconsistencies in appellant's testimony about the priors, and was not used to suggest appellant's criminal propensity.

Moreover, assuming judicial error *arguendo*, appellant's claim would not succeed because he did not suffer prejudice from the decision. The inquiry is whether it would be reasonably probable for appellant to achieve a more favorable outcome had evidence of his convictions been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The People adduced considerable evidence of appellant's guilt, and appellant's testimony was weighed against the testimony of three police officers, all of whom had extensive experience with undercover narcotics purchases. Their testimony, contrasted with appellant's inconsistent and contradictory testimony, indicates that that a more favorable result for appellant was not reasonably probable even without the impeachment.

We therefore determine that the trial court did not abuse its discretion by permitting the prosecutor to impeach appellant with his priors.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.